1940 *Present :* **Wijeyewardene J.**

ATTORNEY-GENERAL *v.* EDIRIWICKRAMASURIYA.

220—C. R. Tangalla, 15,915.

Lease—Non-payment of rent—Action to enforce forfeiture—Acceptance of rent—No waiver of claim for forfeiture.

Where an action is brought to enforce a forfeiture of a lease for failure to pay rent, acceptance of rent after the institution of the action does not amount to a waiver of the right to claim a forfeiture.

Where a defendant fails to ask for relief from forfeiture, the Court is not bound to grant relief.

APPEAL from a judgment of the Commissioner of Requests. Tangalla.

D. W. Fernando, C.C., for appellant.

No appearance for respondents.

Cur. adv. vult.

March 20, 1940. WIJEYEWARDENE J.—

The defendant-respondent took on lease from the Crown a land called Mahabalanekalle of the extent of 10 acres 2 roods and 14 perches by indenture P 1 for a period of five years from January 19, 1932. In accordance with the terms of P 1, the lease was subsequently extended for a further period of five years. The rent reserved under the lease is Rs. 38.12 a year payable on the first day of January in every year, the first proportionate payment being made payable before the execution of P 1. It was further stipulated in P 1 :—

> " That if any rent . . . . . shall remain unpaid and in arrears for the space of three months after the time hereby appointed for payment thereof, whether the same shall have been lawfully demanded or not . . . . . this demise and privileges hereby reserved, together with their presents shall forthwith cease and determine and the lessor . . . . . may thereupon enter into and upon the said land . . . . and the same have, repossess, and enjoy as in his former estate. "

The defendant failed to pay the rent for 1938 and the Attorney-General acting on behalf of the Crown instituted this action in December, 1938, for the cancellation of the lease and for the recovery of the rent for 1938 and further damages until the Crown is restored to the possession of the land. Summons was served on the defendant on June 24, 1939, and a Proctor filed his proxy on August 3, 1939, and took time to file answer. The Proctor however did not file answer on the due date but stated that he had no instructions. The case was thereupon fixed for *ex parte* trial on September 7, 1939, when an Assistant Land Clerk of the Hambantota Kachcheri gave evidence. In the course of his evidence he stated that the defendant paid rent for 1938 on April 11, 1939.

Relying on the decision of *Fonseka v. Naiyan Ali*[1], the Commissioner of Requests dismissed the plaintiff's action as he held that the receipt of rent for 1938 by the plaintiff's agent before the service of summons on the defendant destroyed the foundation of the plaintiff's claim for cancellation of the lease which was based on the non-payment of the rent for 1938 by the defendant.

The facts of *Fonseka v. Naiyan Ali* (*supra*) are distinguishable from those of the present action. The plaintiff in that case gave notice to the defendant to vacate the premises occupied by him on or before December 31, 1919, and on his failure to do so sued the defendant asking for rent for December, 1919, ejectment and damages from January 1, 1920. Subsequent to the filing of the action but before the service of the summons on the defendant the plaintiff received payment for January, 1920, and issued a rent receipt for that month. The Supreme Court held that the usual result of the acceptance of rent *for a period subsequent to the period of notice* without any reservation was "a waiver of the notice" and the continuance of the tenancy.

In the present case we have to consider the effect of a payment of rent on an action brought to enforce a forfeiture of lease on the breach of a covenant and not the effect of a payment of rent on a tenancy determined by a notice to quit. In *Evans v. Enever*[2], Lord Coleridge said :—

> "There is a series of cases which establish that if an action is brought for recovery of possession for breaches of covenants in the lease that is an irrevocable election to determine the lease and that no subsequent acts of the plaintiff can be relied on as qualifying that position."

Moreover in this action if the Court gives judgment for the plaintiff the lease will stand cancelled as from December 13, 1938, when the action was instituted. The rent for 1938 was payable in one lump sum at the beginning of 1938. The acceptance of that rent in April, 1939, is in fact an acceptance of rent that fell due before the date when the lease according to the decree of Court will stand cancelled.

I may add that the decision in *Fonseka v. Naiyan Ali* (*supra*) appears to have followed the principles of law laid down in some of the earlier English cases and adopted in *Hartell v. Blackler*[3]. A contrary view was however taken in *Davies v. Bristow* and *Penhros College, Ltd. v. Butler.*[4] In view of the later decision it may become necessary to reconsider the decision in *Fonseka v. Naiyan Ali* if the question arises again for determination.

The plaintiff in the present action was entitled at law to sue the defendant asking for a cancellation of the lease, in view of the express stipulation in P 1. The defendant was no doubt entitled to ask for equitable relief but he failed to do so and in such circumstances the Court is not obliged to give equitable relief—*vide Banda v. Fernando*[5].

[1] *(1920) 22 N. L. R. 447.*
[2] *(1920) 2 K. B. 315.*
[3] *(1920) 2 K. B. 161.*
[4] *(1920) 3 K. B. 428.*
[5] *(1919) 1 Cey. L. Rec. p. 9.*

I set aside the judgment of the Commissioner and order judgment to be entered in favour of the plaintiff in terms of clauses 1 and 2 of the prayer in the petitioner's appeal.

Appeal allowed.